(5)

No. 90-906

In The

Supreme Court of the United States

October Term, 1990

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,

Petitioners,

v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC., *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Intervenor-Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The decision of the United States Court of Appeals for the District of Columbia is without precedent in holding unconstitutional under the separation of powers doctrine legislation enacted by the Commonwealth of Virginia (the "Commonwealth") that created a board of review drawn from members of Congress acting in their individual capacities to exercise limited executive responsibilities regarding a state-created nonfederal body. That decision undermines the concept of federalism by either ignoring, or simply treating as fictional, the fact that the board of review derives all of its powers directly from bylaws adopted by the board of directors of the state-created Metropolitan Washington Airports Authority (the "Authority") under grants of legislative authority found in the nearly identical statutes of the Commonwealth and the District of Columbia.

In the years following construction of both the Washington National Airport in 1947 and the Washington Dulles International Airport in 1962, there had been several earlier attempts at securing a defective local voice in the management, planning and operation of these formerly federally owned airports. Each of these attempts had engaged the interest of the Commonwealth. At the same time, the Commonwealth has always recognized that the airports, while profoundly affecting the residents and economy of its most populous region, are truly unique as the nation's premier gateways to its capital. The struggle to reconcile these national and local aspects of the airports began to bear fruit in 1984 when the federal Secretary of Transportation (the "Secretary")

appointed an Advisory Commission on the Reorganization of the Metropolitan Airports chaired by former Virginia Governor Linwood Holton. The Commission's consensus on how best to balance important local, state, regional and national user interests was reported to Congress. *See* S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985). The report recommended that the federal airports be leased as a unit to an independent regional authority created by the concerted legislative actions of the Commonwealth and the District of Columbia.

The Commonwealth immediately responded to this proposal by enacting a law that created a regional airports authority empowered to acquire both Washington National and Washington Dulles International Airports from the federal government. Ch. 598 §§ 2-3, 1985 Va. Acts 1095, 1096, *reprinted in* App. 88a-89a (1990). Shortly thereafter, the District of Columbia enacted a parallel ordinance. District of Columbia Regional Airports Authority Act of 1985, D.C. Law 6-67 (App. 119a). Subject to a congressional enactment authorizing the transfer of the airports, this state legislation brought into being the Authority as a "public body corporate and politic" which, from its inception has been "independent" of all state and governmental bodies. 1985 Va. Acts, *supra*. Again from its inception, the Authority has been empowered to acquire the airports from the federal government by lease, and the Commonwealth has affirmatively indicated assent to such conditions as Congress thereafter might propose not inconsistent with the act's terms, subject only to approval of the creating jurisdictions' nonfederal chief executive officers. *Id*.

The following year, Congress gave its consent to the legislation of the Commonwealth and the District of Columbia in the Metropolitan Washington Airports Act of 1986 ("Transfer Act"). App. 60a (quoting 49 U.S.C.A. app. § 2451 (West Supp. 1990)); *see* S. Rep. No. 193, *supra*, at 12. The Transfer Act authorized the Secretary to negotiate a 50-year lease with the state-created independent Authority that would include certain conditions specified by Congress. 49 U.S.C.A. app. § 2454 (West Supp. 1990).

While the Authority was to have only those powers conferred upon it by the legislative bodies of the Commonwealth and the District of Columbia (49 U.S.C.A. app. § 2456(a) (West Supp. 1990)), in order to provide user input to an authority concededly dominated by local interests, Congress specified that the participating jurisdictions should create under state law a board of review representing users to be appointed by the Authority's own board of directors from a list of members of Congress. The state-created Authority's board of directors is empowered to reject any candidate-member on the list provided by the Speaker of the House and the President *pro tempore* of the Senate and to request alternate names. Again, to balance the board of directors' regional character, no member of Congress from Virginia or the District of Columbia is permitted to serve on the board of review. 49 U.S.C.A. app. § 2456(f)(1) (West Supp. 1990).

On March 2, 1987, the state-created Authority successfully completed negotiations with the Secretary and entered into lease terms consistent with both the state legislation and the Transfer Act. *See* Lease of the Metropolitan Washington Airports between The United States

of America, etc. and The Metropolitan Washington Airports Authority (App. 163a).

Both Virginia and the District of Columbia then expressly authorized the establishment of the board of review by enacting amendments to their earlier, nearly identical statutes that had created the Authority. Ch. 665 § 5(A)(5), 1987 Va. Acts 1138, 1140 (Reg. Sess.), *reprinted in* App. 110a-11a; D.C. Law 7-18 § 3(c)(2) (1987), *reprinted in* App. 142a-43a.

It is thus apparent that the Commonwealth's law both created, and now permeates and sustains, every aspect of the Authority, including its board of review.

The profound effect of the Authority's airports on the economy of the Northern Virginia community and, indeed, that of the entire Commonwealth requires little elaboration. As of 1987, the airports served the sixth largest passenger market in the United States and the airport system represented the nation's eighth largest in terms of passenger emplanements. The airports are among the largest generators of employment in the Commonwealth. The Washington Dulles International Airport has a total employee population of 10,684 (as of January 1, 1990) while the Washington National Airport has a like population total of 10,333 (as of June 1, 1990). Again, in 1987, more than $3.2 billion of business activity was generated by the activities of the two airports, which included more than $468 million paid out in wages and salaries to those holding jobs directly dependent upon the airports' activity. Approximately $81 million of state and local taxes were generated by passenger and freight activity at the airports.

The indirect effects on the regional and state economy of these airports tell a similarly impressive story. No imagination is required to comprehend the staggering economic impact that resulted in 1987 alone from the 6.7 million visitors who arrived in the Washington metropolitan area by way of these airports.

Accordingly, given the potential for disruption of normal airport operation, planning and development posed by the decision rendered by the court of appeals, the Commonwealth supports the Authority in urging this Court to review that decision. Moreover, the Commonwealth itself is deserving of a full *amicus* opportunity to discuss the merits of the court of appeals' unprecedented conclusions concerning a state's right to engage voluntarily members of Congress in nonfederal service by so providing in its own law.

SUMMARY OF ARGUMENT

The court of appeals' decision fails to appreciate the significant and determinative role played by state legislation in the creation of every aspect of the Authority's powers and duties, including those of its board of review. It mistakenly carves out a role for Congress in the creation of the board of review that is contrary to its actual legislative and political history.

There is no constitutional prohibition on Congress' establishing a condition to which a state may voluntarily agree in order to acquire federal property. Moreover, state legislative adjustments made to reach accord with the federal executive along lines approved by Congress are

routine. Heretofore, no authority implicitly has held that the resulting state legislation is thus transformed into federal legislation.

The decision below overlooks the sensitive notion of federalism in holding unconstitutional under the separation of powers doctrine a state-created nonfederal review body whose members, though appointed from lists supplied by Congress, may be removed solely by the state-created authority that appoints them. The decision is thus unique in holding that states may not constitutionally legislate to employ the service of members of Congress in state-created nonfederal political bodies.

Whatever the prohibitions attending the exercise of federal executive authority by members of Congress, those prohibitions have not been demonstrated by logic or precedent to have automatic relevance to such exercise of nonfederal executive authority.

The delicate balance reached by sovereign governments in order to address the serious transportation needs of the region has been upset by the complaint of the respondents, a private citizens' group, even though the relief requested does nothing to address respondents' actual concerns.

Solving regional issues, including serious transportation needs, has required innovative approaches within our federalist framework for more than two centuries, and it doubtless will require more of the same as a new century dawns.

ARGUMENT

Remarkably, the decision of the court of appeals fails to appreciate the essential legislative roles played by the Commonwealth and the District of Columbia in the creation of every aspect of the Authority's powers and duties, including those of its board of review. Although the opinion acknowledges that Virginia and the District of Columbia could have refused the "deal offered by Congress," it fails to appreciate the full significance of this concession (App. 11a).

This characterization of the Commonwealth's role in the creation of the Authority misapprehends the actual legal genesis of the Authority and its board of review.

Contrary to the court of appeals' decision, Congress did not offer any "deal" to the Commonwealth; Congress merely authorized the Secretary to engage in negotiations with the independent state-created Authority for purposes of concluding lease terms transferring airport ownership to the Authority that would derive its jurisdiction and powers from nonfederal legislative authorities. 49 U.S.C.A. app. § 2456(a). The Secretary was not mandated to conclude a lease, and the decision to do so was clearly her decision and that of the Authority, and not that of Congress. Accordingly, the decision of the court of appeals carves out a role for Congress in the creation of both the Authority and its board of review that cannot be squared with the Authority's actual legislative and political history.

That Congress chose to attach reasonable conditions to any transfer of the airports out of federal ownership is hardly remarkable from the Commonwealth's perspective. The Commonwealth is accustomed to having to meet

a variety of conditions established by Congress. As this Court has so often noted, when a state chooses to meet such conditions, it does so voluntarily. *See South Dakota v. Dole*, 483 U.S. 203 (1987). Clearly, that was the case here.

It is also not remarkable for a state to alter its own law in order to reach an accord with the federal executive along the lines that Congress has authorized. *Id.* Nevertheless, according to the logic of the opinion below, in every such case, the resulting state legislation is "federalized" simply because it is in harmony with an authorizing congressional enactment.

The court of appeals' decision neglects to consider whether there is not some sensitivity surrounding the notion of federalism in holding unconstitutional under the separation of powers doctrine a state-created nonfederal body composed of certain members of Congress who sit "in their individual capacities, as representatives of users" (49 U.S.C.A. app. § 2456(f)(1)), and who may be removed by the state-created body that appoints those representatives (App. 26a). That decision thus implicitly holds that states may not constitutionally legislate to employ the services of members of Congress in state-created nonfederal political bodies. Assuming, for argument's sake, that this conclusion may yet prove correct, it certainly deserves a supporting opinion conscious of its novelty and sensitive to its broader implications for our system of federalism.

That Congress may have induced the Commonwealth to do something voluntarily which it would not otherwise have done is far from unprecedented in the annals of federal-state relations or even worthy at this historical juncture of serious constitutional concern. *Dole*, 483 U.S.

at 203. Whatever the contours of prohibitions attending the exercise of federal executive authority by members of Congress, they have no automatic relevance to such exercise of nonfederal executive authority. *Kwai Chiu Yuen v. Immigration and Naturalization Service*, 406 F.2d 499 (9th Cir.), *cert. denied*, 395 U.S. 908 (1969).

A delicate balance had been reached by both the legislative and executive branches of state and federal government in order to address the serious transportation needs of the Washington metropolitan area. Solving issues that transcend the borders of a single state and embrace the legitimate concerns of more than one sovereign has required innovative approaches within our federalist framework for the past two centuries, and it will doubtless require more of the same as the nation enters a new century. It would be ironic if the complaint of a private citizens' group were permitted to undo the carefully crafted political framework of sovereign governments, even though the relief so requested and granted that group does nothing to address its underlying noise and safety concerns.

CONCLUSION

No opinion cited in the decision of the court of appeals addresses whether a state may secure through its own law the nonfederal service of a member of Congress. While the decision of the court of appeals does not expressly acknowledge this holding, it clearly reaches

this result. Moreover, it does so with no apparent appreciation for how it may affect the broader existing framework of state government and without even an articulable answer to the question of how such a holding can possibly benefit the citizens' group that urged it.

Amicus respectfully urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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